BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JONATHAN D. NELSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,732
DURHAM SCHOOL SERVICES	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 27, 2010 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ awarded claimant benefits in the form of medical treatment with Dr. Curtis and all referrals for orthopedic treatment until further order.[1]

The respondent requests review of this preliminary hearing Order and alleges the claimant failed to meet his burden of proof that he suffered a compensable injury at work because any injury was caused as a result of claimant engaging in normal activity of day-to-day living. Respondent also asks that the claimant's claim for benefits be denied and the ALJ's Order be vacated.

The claimant asserts he has established that the accidental injury is compensable since the accident occurred while claimant was at work performing regular duties. Claimant asks the Board to affirm the ALJ's preliminary hearing Order granting claimant medical treatment.

The only issue before the Board is whether claimant's alleged accidental injury arose out of and in the course of employment with respondent.

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[1] ALJ Order for Medical Treatment (Jan. 27, 2010) at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant worked as a mechanic technician for the respondent. His job responsibilities included climbing ladders, walking up and down stairs, getting on the floor and rolling under buses, carrying heavy items and loading and unloading.[2] The claimant first noticed a pain in his right knee while walking up stairs at work on or around August 12, 2008.[3]

Claimant continued his regular duties until August 19, 2008, when the pain escalated to an unbearable level. The pain caused the claimant to report the injury to his supervisor.[4] Besides verbally reporting the injury to his supervisor he also completed and gave to respondent an incident report dated August 19, 2008.[5] Claimant did not request any medical treatment for his right knee at this time nor did respondent offer any medical treatment. Claimant did not request medical treatment for his right knee from the respondent until May 2009.[6] Respondent then authorized claimant to see Dr. Donald T. Mead, whom claimant saw once.

After August 2008, claimant did receive treatment from his personal physician, Dr. Bradley Pittman. Dr. Pittman x-rayed the knee and recommended certain exercises.[7]

Claimant is an active 28-year-old who occasionally jogs, works on his Jeep and performs small painting and carpentry jobs for friends and family.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[8] A

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[2] P.H. Trans. at 6-7.

[3] *Id.*, at 30.

[4] *Id.*, at 8.

[5] *Id.*, at 8 and Cl. Ex. 2.

[6] *Id.*, at 9.

[7] *Id.*, at 10, 11.

[8] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[9] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[10] The existence, nature and extent of the disability of an injured workman is a question of fact.[11] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[12]

The respondent contends the claimant failed to meet the burden of proof that he suffered a compensable injury at work. The respondent cites inconsistencies in claimant's testimony that calls into question whether the injury occurred at work. Respondent further asserts claimant's injury was a result of claimant engaging in normal activities of day-to-day living.

Claimant is not a good historian. However, the fact that there are minor inconsistencies in claimant's testimony does not necessarily defeat claimant's claim for benefits.

When weighing all the evidence compiled to date, this Board Member finds and concludes the preponderance of the evidence supports the finding that claimant's injury arose out of and in the course of his employment with the respondent.

Claimant first experienced pain in his right knee while at work. He experienced pain when he used his right knee at work.[13] He reported the accident to the respondent within 10 days of first experiencing the pain and made a written report of the accident to the respondent.

For an injury to be compensable it is required that there be "some causal connection between the accidental injury and the employment."[14]

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[9] K.S.A. 2008 Supp. 44-501(a).

[10] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[11] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[12] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[13] Nelson Depo. at 12.

[14] *Siebert v. Hoch*, 199 Kan. 299, 303, 428 P.2d 825 (1967).

Respondent argues *Martin*[15] is applicable to the case at bar. The court in *Martin* held that disability (injury) was not compensable because Martin never presented any evidence that he encountered any risk at work which he would not have encountered absent his employment. The *Martin* case can be distinguished from the instant case. The *Martin* case turns on the fact that Martin had a preexisting condition. No preexisting condition is alleged in the case at bar.

At this juncture of the proceedings this Board Member finds and concludes the claimant has sustained his burden of proof that his accidental injury arose out of and in the course of his employment with respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the January 27, 2010 Order for Medical Treatment entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Terry E. Beck, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] *Martin v. CNH America, LLC*, 40 Kan. App. 2d 342, 195 P.3d 771 (2007), *rev. denied* 286 Kan. 1178 (2008).

[16] K.S.A. 44-534a.